

The Public Service Board recently issued an Order dismissing, without prejudice and at VTel's request, an application for a Certificate of Public Good to construct a 140' telecommunications tower on Bayne-Comolli Road (on one of the most prominent ridgelines in town) in the Town of Calais. In the Calais Selectboard's opinion, the proposed Vtel telecommunications tower was not in compliance with various town plan provisions and zoning regulations, or the provisions of State law that promote collocation on existing towers and structures rather than constructing new towers. The Town of Calais spent tens of thousands of dollars to have its voice heard in the 248a proceeding before the PSB. Even though the Public Service Board's 248a process pre-empts local zoning, the Selectboard has a duty and responsibility to make recommendations and take steps to preserve the intent of those regulations.

The Selectboard retained a radiofrequency propagation expert to analyze Vtel's proposal. The expert concluded that VTel's antennas could be collocated on the existing Cloud Alliance tower in Woodbury and would in fact provide superior coverage to more rooftops. The Department of Public Service's radiofrequency expert agreed with the Town's expert and even Vtel's expert agreed at one point that collocation was the better option. However, VTel refused until the very end to collocate its antennas on the existing Cloud Alliance tower even though the evidence indicated that VTel was aware of the Cloud Alliance site and of problems with its own proposed site as early as April 2015. Instead, VTel went forward with its flawed proposal only to withdraw its application days before the scheduled technical hearing.

Developers should work with towns early in the process of siting towers and fully explore alternative sites, including any options for locating facilities on town owned lands, before submitting an application for PSB approval. In this case, Calais offered to work cooperatively with VTel early on, but VTel rejected the Town's offer to cooperatively find a site that met its needs and the needs of the town.

Participation in the § 248a process places a very substantial economic burden on municipalities. I don't believe that the Legislature ever intended for municipalities to shoulder such a burden simply to defend their interests and make their voices heard before the PSB. We are working with our representative to reevaluate the impact of the 248a process on towns and to make changes to the existing law.

The project did not comply with our town plan or zoning regulations which are pre-empted in the PSB process.

- Proposed tower not in compliance with various town plan provisions, Section 4.11 of the Zoning Regulations, and the provisions of State law that promote collocation on existing towers and structures rather than new construction. Even though the PSB's 248a process pre-empts local zoning, the Selectboard still has a right and a duty to make recommendations and take steps to preserve the intent of those regulations;

- The Selectboard retained experts to analyze Vtel's proposal, including an aesthetics expert and a radiofrequency propagation expert, and those experts opined that the proposal would have undue adverse aesthetic impacts and that VTel's antennas could be reasonably collocated on the existing Cloud Alliance tower. The DPS' retained RF expert agreed with the Town's expert;
- VTel refused until the very end to collocate its antennas on the existing Cloud Alliance tower even though all of the RF experts, including VTel's own expert, had stated that the Cloud Alliance site was superior to the proposed Perkins site. The evidence indicated that VTel was aware of the Cloud Alliance site and of problems with its own site as early as April 2015, but VTel nonetheless went forward with its flawed proposal and put the Town to significant expense to prove that its proposal did not meet the requirements of § 248a;
- The Town tried to convince VTel to withdraw its proposal in light of the evidence regarding the benefits of collocation before VTel filed its Notice of Withdrawal, but VTel did not formally attempt to withdraw its petition until five weeks later (and three business days before the scheduled technical hearing), requiring the Town to incur substantial expenses responding to discovery and preparing for trial;
- The Town attempted to convince the PSB to exercise its discretion to dismiss VTel's petition with prejudice and with the condition that VTel explain the timing of its withdrawal, potentially allowing the Town to recover some of its costs, but the PSB refused to do so;
- The PSB process for approving telecommunications facilities, as set forth in 30 V.S.A. § 248a and as interpreted and applied by the PSB, places very substantial burdens on intervening parties, including municipalities. To defend their interests, interveners, including municipalities, must incur significant "frontloaded" costs simply to demonstrate that a project "raises significant issues" under the criteria of § 248a. To do so, it is necessary very early in the process to retain experts and present evidence simply to demonstrate to the PSB the need for a hearing. Even if the Board determines to hold a hearing, the process is expedited and intervening parties wishing to defend their interests must not only provide evidence in the form of written testimony, reports and exhibits, but must also conduct discovery to learn the true facts regarding an application. In this case, the Town's discovery requests to VTel demonstrated very significant flaws in VTel's project, but VTel resisted the Town's attempts to learn the truth about the project, thereby increasing the Town's costs;
- The statute, 30 V.S.A. § 248a(c)(3), requires an applicant to demonstrate that a proposed facility "reasonably cannot be collocated on or at an existing telecommunications facility" but does not require the applicant to submit a detailed alternatives analysis. Very early in the process, the Town identified the Cloud Alliance tower as an existing facility on which VTel could collocate its wireless facilities, but VTel summarily rejected this suggestion. The Town had to hire an expert to prove that collocation was reasonably available. The analysis by the Town's expert showed that not only was collocation reasonable, but also

that collocating on the Cloud Alliance tower better met VTel's coverage objective (which was never accurately stated and which it continued to change throughout the case in an effort to avoid the Town's evidence);

- Developers should work with towns early in the process for siting of towers, solar and wind – explore options for locating on town lands so towns receive the payments to help reduce taxes; The Town offered to work cooperatively with VTel early in this case, but VTel rejected the Town's offer to cooperatively find a site that met its needs.
- Vtel's consistent refusal to consider collocation as a reasonable option in this case, to provide the Town with the true facts regarding the reasons for its refusal (even in the face of evidence demonstrating the benefits of collocation), and its very late withdrawal of its application on the eve of the trial all contributed significantly to the Town's costs in this case.

Chronology of VTel Wifi Tower Project in Calais

Feb 2014 [sic] – Diane Guite/ VTel expresses interest in acquiring Cloud-Alliance Woodbury tower, in connection with possible collocation on/acquisition of Plainfield C-A tower.

Feb. 25, 2015 - VTel serves 45-Day Notice on Calais, containing the wrong the tower site. VTel has just finalized negotiations with landowner Perkins on the new site, and must get revised engineering drawings done.

April 3, 2015 [36 days into 45-day period] – VTel formally amends Notice to show correct tower site.

April 15, 2015 – VTel's RF expert Ronnie Jemmott emails to Gordon Mathews of VTel that placing their equipment on the Cloud-Alliance tower in Woodbury gives superior coverage: "Overall Calais_01 CA* seems to be the better option in the long run." Mathews replies: "That's not the conclusion we were hoping for." [*This is VTel's designation for the C-A tower; the proposed Perkins site is Calais_01 CC.]

April 15, 2015, evening – VTel holds public hearing at Calais Select Board to introduce the project. Town/neighbors offer to work together w/ VTel to find a more appropriate site or collocation; Mathews insists VTel 'will not give up on the Perkins/Calais site.'

May 15, 2015 – VTel files PSB Application for a Certificate of Public Good for the tower. It states [Proj Narrative, pg. 10]: "collocation on the existing tower in Woodbury maintained by Cloud Alliance...*will not satisfy VTel's coverage objective for the area...*"

June 6, 2015 – Town's Radio Frequency expert, Brian Webster, files testimony that the Cloud-Alliance tower in Woodbury is a superior site for delivering VTel's coverage objectives.

June 6, 2015 – DPS RF expert, Scott Heffernan, files testimony that the C-A tower in Woodbury would not be suitable for VTel's equipment BUT VTel did not provide enough information for him to make a final determination.

July 3, 2015 – Michel Guite email to Christopher Recchia, VT Commissioner of Public Service – “Calais is going down in flames.” Guite offers to give Calais a ‘different plan’ [ie, collocation, or a different site in Calais] if PSB will ‘green light’ VTel’s Rochester and Cabot tower projects. This offer is repeated to Recchia in 7/7/15 email. Guite says VTel and DPS should ‘cooperate’.

July 8, 2015 – Guite checks out other sites in Calais for a tower or collocation – other than C-A Woodbury.

Aug. 6, 2015 – PSB Prehearing Conference held, Town and NCNC granted party status; assigns Town to address collocation [etc], and NCNC, aesthetics, but the scope of intervention is unclear, and parties must petition for clarification.

Aug. 25, 2015 – Hearing Officer Faber clarifies scope of intervention in Revised Prehearing Conference Memorandum.

Aug. 26, 2015 – Discovery requests by non-petitioning parties due [per original schedule, approved by PSB] and filed.

Sept 23, 2015 – Responses to non-petitioning parties’ discovery due [per revised schedule, approved by PSB] and filed.

Oct. 6, 2015 – DPS’ Radio Frequency expert Scott Heffernan of EBI Consulting files testimony agreeing that Cloud-Alliance tower in Woodbury would be better site for VTel to reach their target area. Heffernan’s testimony is in agreement with the Town’s RF expert, and also with VTel’s RF expert Jemmott’s ‘private’ assessment, that VTel’s coverage objectives would be better served from the C-A Woodbury tower. All parties are in agreement about collocation.

Oct 18, 2015 – Depositions by non-petitioning parties due [per revised schedule, approved by PSB] and filed.

Nov. 6, 2015 – Prefiled testimony by non-petitioning parties due [per revised schedule, approved by PSB] and filed. Town’s RF expert Brian Webster files additional testimony that the Cloud-Alliance Woodbury site is superior to the proposed Calais site.

Nov. 13, 2015 – Discovery and deposition requests by Petitioner due [per revised schedule, approved by PSB] and filed.

Nov. 23, 2015 – Responses to Petitioner’s discovery due [per revised schedule, approved by PSB] and filed.

Dec. 9, 2015 - VTel files Motion to Withdraw w/o Prejudice.

Dec. 10, 2015 – Evidentiary objections/motions due [per revised schedule, approved by PSB], now moot.

Dec. 14, 2015 – Technical Hearing and Surrebuttal testimony scheduled. Responses to evidentiary objections/motions due [per revised schedule, approved by PSB], now moot.

Dec. 30, 2015 – PSB orders Dismissal without Prejudice.

Jan. 20, 2016 – Technical Hearing re-scheduled by PSB pending PSB decision on VTel’s withdrawal without prejudice, now moot. PSB declined to issue order “with prejudice.”

ATTACHED: April 17, 2015 letter from Calais Selectboard to Vtel’s attorneys following the public meeting of April 15, 2015.

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